COMPLIANCE BOARD OPINION NO. 96-4

May 1, 1996

Mr. Tom Marquardt
Ms. Eleanor Vernon

The Open Meetings Compliance Board has considered your complaints dated February 27, 1996 and March 6, 1996, respectively, regarding the Queen Anne's County Board of Appeals. The Compliance Board has concluded that the Board of Appeals' prior practice may well have been inconsistent with the Act's open meetings requirement, but the Board of Appeals' current practice conforms to the Act. The Compliance Board has further concluded that a telephone discussion among the members of the Board of Appeals violated the Act.

I

Factual Background

A. General Meeting Practices

With one exception, discussed below, these complaints focus not on any particular meeting but rather on an alleged practice of the Queen Anne's County Board of Appeals of closing the deliberative portion of its meetings to the public. Specifically, Mr. Marquardt complains that, "after the board chairman formally adjourns its meeting its members continue to meet in the absence of the public." Likewise, Ms. Vernon asserts that, to her knowledge, "the Board of Appeals has never held in open session its meetings to deliberate decisions."

In addition, Mr. Marquardt alleges that the Board of Appeals has violated various procedural requirements of the Act by failing to provide advance notice of a closed session, failing to vote to hold a closed session, failing to keep minutes of the "post-adjournment meeting," and failing to provide information about the closed meeting in the minutes of the next open meeting.

The timely response of the Board of Appeals to the complaints consisted of two letters: one from Marion Leverton, the Board's Chairman, and another from Michael R. Foster, Esquire, the Board's counsel. Mr. Foster explained that, historically, the majority of the Board's cases involved relatively straightforward requests for variances. The Board would schedule hearings on these variance applications sequentially, all open to the public. "[F]requently, testimony on one hearing is concluded and we would immediately proceed with the testimony in the next hearing, reserving the decision making until the end of all the testimony. I have represented

the Board for thirteen (13) years and to the best of my knowledge when those decisions were being made the Board occupied their same seats, in the same room, with the door being open." Mr. Leverton confirms that, because the hearings are scheduled sequentially but the exact length of any hearing is unpredictable, the Board typically waits until the conclusion of testimony in the last case before discussing all of the cases and making its decisions. "This was done in the same meeting room, with the door open to the public. I should point out that this same procedure has been employed by the Board since 1963."

Mr. Leverton denied the allegation that a formal "adjournment" signaled the end of the sequence of hearings prior to the Board's deliberations: "To the best of my knowledge there never has been a motion for adjournment at the end of a meeting.... [T]he Board would conduct its deliberations at the same meeting table, in the same room, with the door open, at the end of the last hearing of the evening." Mr. Leverton also stated "that the door to that room always remained open, except for a few occasions where other meetings were proceeding in other parts of the building, or noise may have required the door to be closed." Finally, Mr. Leverton stated that the Board had more than satisfied the requirements of the Open Meetings Act regarding minutes through compliance with Article 66B, §4.07(c) of the Maryland Code, which requires the Board of Appeals to make public a transcript of its proceedings.

According to Messrs. Foster and Leverton, inquiries from Ms. Vernon led the Board to realize that the public misunderstood the Board's procedures. Hence, wrote Mr. Leverton, "the Board immediately adopted a new procedure for the next hearing date whereby those present would be clearly informed they were welcomed to stay for the deliberations which would occur after the last hearing." Mr. Leverton went on to indicate that the Board's deliberative process might vary with the circumstances. That is, if there turned out to be an interval between the end of one hearing and the scheduled starting time for the next, the Board might make its decision in public between the two hearings. Apparently, this procedure was used at a Board meeting on February 29, 1996.[1] Conversely, in a more complicated case, the Board might defer any decision on the evening of the hearing until its attorney could conduct legal research or Board members could review transcribed testimony. "The Board will then announce the date of the subsequent hearing, and/or send written notification to all parties present of the time, place, and date of a subsequent meeting. There never have been, nor will there be, secret meetings."

The Compliance Board also received letters containing additional information from Mr. Marquardt and Ms. Vernon. Mr. Marquardt reiterated his contention that, at least under the prior procedure at the Board of Appeals, the hearing portion was ended with "adjournment." Mr. Marquardt supplied a copy of a written outline of the

[1] The Board might also close a meeting to the public for a reason permitted under the Act — for example, to obtain legal advice from its counsel. The Board did so at its February 29 meeting.

procedure followed at Board hearings, the last entry of which is "I now declare this hearing to be adjourned." Mr. Marquardt also reiterated that a reporter for his paper "was also told by Board members that it was procedure to first adjourn the meeting and then proceed with an executive session. The Board members said that any public present was told the meeting was over."

B. Specific Alleged Violation

Apart from his complaint about the Board's general practices, Mr. Marquardt referred to one occasion during which the Board allegedly "conducted public business with two members speaking to the third by phone. No minutes were kept, another violation of the Act and one that precludes me from determining the date. This occasion, attended in effect by a quorum, constituted a meeting which held behind closed doors is a violation of the Act."

Mr. Leverton provided the following account of this incident: The case involved a controversial request to extend a pier into a river. After the hearing, the Board discussed the matter and reached a decision, subject to further research by the Board's attorney "to determine that [the Board's] decision had a proper legal foundation." Before the attorney could conclude the research, however, one Board member experienced personal problems that caused him to miss subsequent Board meetings. After the attorney reported that there was a sufficient legal basis for the decision made after the hearing, a lengthy effort was made to locate the third Board member to convey this information to him. At last, the two Board members "were successful in reaching this third member by telephone, and, when informed of the attorney's findings he agreed that the written decision should be prepared on the basis of the original vote taken."

II

Analysis

The Open Meetings Act applies to a public body when it is meeting to consider a variance "or any other zoning matter." §10-503(b)(2) of the State Government Article, Maryland Code. Hence, the Open Meetings Act applies to the Queen Anne's County Board of Appeals when it is conducting hearings and deliberations after the hearings. Unless the Board has a basis for asserting one of the exceptions in §10-508(a), the Board "shall meet in open session." §10-505.

"An open session means that members of the public are, as a practical matter, able to attend." Compliance Board Opinion 93-8, at 3 (July 16, 1993). In that opinion, we held the requirement for an open meeting to have been violated when a meeting was held without notice in an unusual location. Similarly, in Compliance Board Opinion 94-6 (August 16, 1994), we pointed out that an open door is not enough to satisfy the Open Meeting requirement; in that situation, the theoretically

open meeting was held in a county commissioner's office. We observed: "The setting was plainly such that members of the public were not, as a practical matter, able to attend the meeting ...." Compliance Board Opinion 94-6, at 4 n.3.

The Compliance Board is of the view that if a public body announces the adjournment of its meeting and pauses while members of the public leave, any subsequent discussion is not held in an "open session," as required by §10-505, even if the door to the room remains open. As a practical matter, this manner of proceeding would cause a reasonable member of the public to conclude that the meeting was over.

Whatever may have happened in the past, the Compliance Board notes with approval that the Board of Appeals will henceforth explicitly invite members of the public to remain for deliberative discussions that follow the scheduled hearings. This new procedure should ensure that a meeting open in theory is open in fact as well.[2]

With respect to the Act's requirement for minutes, the Compliance Board regards the preparation of a complete transcript as ample compliance. All of the elements called for by §10-509(c) would be found in the transcript. If the Board of Appeals does indeed make such transcripts public, no violation of the Act will have occurred.

Finally, we turn to the telephone conversation involving a quorum of members. In the Compliance Board's view, that conversation violated the Act. It is immaterial that the discussion essentially reaffirmed a decision that had previously been made. This reaffirmation was itself part of the decision-making process. "If a matter is required to be discussed in open session, every aspect of the public body's discussion, from the beginning to the end, must be in open session." Compliance Board Opinion 94-5, at 13 (July 29, 1994).

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Walter Sondheim, Jr.
Courtney McKeldin
Tyler G. Webb

[2] Mr. Leverton observed that "most people will not stay since all parties are generally anxious to leave the night time meetings as soon as possible." This may be true, but the point is that people need to be clear that they have a right to stay, even if they then choose to leave instead.